IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.226 OF 1985

Jainabi Shaikh Akbar ...Appellant

Vs.

1.The Additional Collector (BSD)
2.The Tahsildar (E & C), Kurla-Chembur
3.The Tahsildar,Atikraman Nivaran
Karyalaya
4.State of Maharashtra
5.Shikshan Mitra Mandal Co-operative
Housing Society Ltd. ...Respondents

Mr.Surel Shah for the Appellants
Mr.A.R.Patil,A.G.P. for the Respondent Nos. 1 to 4.
Ms N.R.Iyer for Respondent No.5 (absent).

CORAM: A.S.OKA, J.
DATE OF HEARING THE LAST ARGUMENTS: AUGUST 8,2006
DATE OF PRONOUNCEMENT OF JUDGMENT: SEPTEMBER 28,2006.

JUDGMENT:

1. By this First Appeal, the Appellant-Plaintiff has taken exception to the Judgment and Order dated 15th April 1985 by which the learned Trial Judge has rejected the plaint filed by the Appellant. For the purposes of appreciating the submissions made by the Advocates appearing for the parties, it will be necessary to refer to the facts of the case in brief.

2. The Appellant filed a S.C.Suit No.4597 of 1978 in the City Civil Court at Mumbai praying for setting aside the order dated 5th February 1976 passed by the first Respondent (first Defendant) deleting the Appellant’s name as a holder

of the plots bearing City Survey Nos.155 (2) and 153 situated at L.B.S.Marg, Kurla, Mumbai. The case of the Appellant is that she is in possession of the said plots. It is the case of the Appellant that there is a brick masonry shed on the plots and the same has been let out to the tenants who are carrying on business of running motor garages. According to the case of the Appellant, he is in possession of the said plot of land for last more than 50 years and at least from the year 1948. It is stated that in respect of the plot of land bearing C.T.S.No.155 (2), the State Government issued a Sanad in favour of the Appellant. The Appellant received a notice dated 20th October 1975 purporting to be a notice under section 20(2) of the Maharashtra Land Revenue Code, 1966 stating that the Respondent No.5 herein has made an Application dated 10th June 1974 to the Government of Maharashtra stating that there was a dispute concerning boundaries of plots bearing city survey No.155(2) and 153. It was stated that Sub Divisional Officer, Bombay Suburban District has decided to inspect the plots on 23rd October 1975 at 9.30 a.m. The Appellant was directed to remain present before the Sub Divisional Officer on 25th October 1975 for the purposes of enquiry. According to the case of the Appellant, he submitted a letter to the Sub Divisional Officer seeking time. It appears that the Sub Divisional Officer submitted a report dated 15th January 1976 to the first Respondent without giving any opportunity to the Appellant of being heard. The Additional Collector, Mumbai

Suburban District passed that the impugned order dated 5th February 1976 holding that order dated 31st January 1966 passed by the Enquiry Officer declaring the Appellant as the holder of city survey No.155 (2) was not correct. The Additional Collector, therefore, directed that the name of Smt.Jainabi Akbar (Plaintiff -Appellant) shown as 'Holder' of the property should be removed and the land should be shown as vesting in the State Government. He directed that the steps should be taken to remove encroachment on the said property. The case of the Appellant is that though repeated requests were made for grant of certified copy of the order dated 5th February 1976, the copy of the order was not supplied. The City Survey Officer by order dated 18th February 1976 deleted Appellant's name as a holder. According to the case of the appellant, an Appeal was preferred by her for challenging the order dated 5th February 1976. It is stated in the plaint that the Appeal was preferred on 29th September 1976 and the same is not yet decided.

3. The second Respondent filed a written statement contesting the suit. According to the case of the said Respondent, the Appellant failed to attend his office and failed to produce any documentary evidence regarding her title. There is no specific denial about any Appeal preferred by the Appellant. There is one more written statement filed by the first, third and fourth Respondents.

In the said written statement, it was contended that the said Defendants were not admitting that the Appellant presented any Appeal on 29th September 1976 and that the same is pending. A separate written statement was filed by the fifth Respondent.

4. By the impugned order, the learned Trial Judge held that the suit was not maintainable as remedy of preferring an Appeal under the provisions of the Maharashtra Land Revenue Code, 1966 (hereinafter referred to as the said Code) has not been exhausted by the Appellant. It was also held that the Civil Court cannot entertain the suit in view of the specific bar created by section 4 and 11 of Bombay Revenue Jurisdiction Act, 1876 (hereinafter referred to as the said Act of 1876). The learned Trial Judge therefore passed an order of rejection of the plaint under Order VII Rule 11 of Code of Civil Procedure, 1908.

5. Shri Shah appearing for the Appellant submitted that the order dated 5th February 1976 which was challenged in the suit is invalid as well as null and void. He placed reliance on the decision of the Full Bench of this Court in case of Abdullamiyan Abdulrehman Vs. Government of Bombay (A.I.R. (29) 1942 Bombay page 257). He submitted that the bar under section 11 of the Bombay Revenue Jurisdiction Act, 1876 will not apply as the impugned order is nullity. He submitted that as the order is nullity, it was not necessary for the

Appellant to prefer an Appeal and a civil suit was maintainable. He also placed reliance on the decision of the Apex Court in case of Church of North India Vs. Lavajibhai Ratanjibhai and others [(2005) 10 S.C.C. page 760] and submitted that exclusion of jurisdiction of the Civil Court cannot be readily inferred. He submitted that the finding recorded by the Trial Court is erroneous.

6. The learned A.G.P. supported the impugned order by pointing out that a remedy of an Appeal was provided under section 20 of the said Code. He submitted that after exhausting remedies provided under section 20 of the said Code, the Appellant could have approached the Civil Court. He submitted that by necessary implication jurisdiction of the Civil Court was ousted. He submitted that the bar under section 11 of the said Act of 1976 will squarely apply.

7. I have carefully considered the submissions. It will be necessary to refer to the order dated 5th February 1976. It is purportedly passed under section 20 of the said Code. Notice dated 20th October 1975 was issued by the Sub Divisional Officer, Mumbai under section 20(2) of the said Code. In the said notice, it was stated that an application has been filed by the fifth Respondent on 10th June 1974 stating therein that there was a dispute concerning boundaries of land bearing city survey No.155/2 and 153 of Kurla. The Appellant was called upon to attend the hearing.

A reply was submitted by the original Plaintiff on 27th October 1975 in the office of the Sub Divisional Officer. The impugned order dated 5th February 1976 has been passed by the Additional Collector. The said order records that the Sub Divisional Officer was directed to institute an enquiry under section 20(2) of the said Code and he has submitted his report on 15th January 1976. The order records that in the said report, the Sub Divisional Officer has recorded a conclusion that city survey No.155/2 and 153 belongs to the Government and the original Appellant had encroached upon both the pieces of land. The Sub Divisional Officer recommended that the order passed in the city survey enquiry dated 31st January 1966 should be set aside. The order dated 5th February 1976 records that the recommendation of the Sub Divisional Officer was accepted by the Additional Collector.

8. It is specifically contended in the plaint that there was no proper enquiry by the Sub Divisional Officer on the basis of notice under section 20(2) of the said Code. It is alleged that no opportunity was given to the plaintiff to produce documents for establishing title though time was sought under letter dated 25th October 1976. In the plaint there is no specific assertion that the order dated 5th February 1976 is nullity. However, it is asserted that the order is invalid. 9. Section 11 of the said Act of 1876 reads thus :

"11. No Civil Court shall entertain any suit (against

the Crown) on account of any act or omission of any Revenue-Officer unless the plaintiff first proves that previously to bringing his suit, he has presented all such appeals allowed by the law for the time being in force as, within the period of limitation allowed for bringing such suit, it was possible to present."

10. In the present case, the finding of the trial court is that bar under section 11 of the said Act of 1876 is attracted. The learned Advocate for the Appellant has placed reliance on the decision in case of Abdulmiyan Abdulrehman (supra). The said decision is by a Full Bench of this Court. The Full Bench held that where an authority which purports to pass an order is acting without jurisdiction, the purported order is mere nullity and it is not necessary for anybody who objects to that order to apply to set it aside. It is held that the bar created by section 11 will not apply when the order of a Revenue Court is invalid. The decision of the Full Bench was delivered by Beaumont C.J. This Court held that,

. **"In my opinion, the view taken by this Court in 55 Bom.165, is correct, and if no valid order has been passed by the revenue authority, S.11 does not come into operation.** The actual question which we are asked to answer is not, I venture to think, very happily expressed. It is: "Whether the fact that

an act or order of a revenue-officer is invalid or ultra vires prevents the operation of S.11, Revenue Jurisdiction Act, and gives jurisdiction to the Court to entertain a suit on account of the act or order which would otherwise be barred by that section." It is obvious that the existence of an order which is invalid cannot confer jurisdiction on the Court, and on a strict use of language, an order which is invalid is not an order. **I would prefer to answer the question by saying that where a revenue officer purports to do an act or pass an order which is invalid his action does not operate to raise a bar under S.11, Bombay Revenue Jurisdiction Act. Costs will be costs in the appeal. the case will go back to the referring Court."** (Emphasis supplied)

The Apex Court in case of Church of North India (supra) in paragraph No.39 held thus :

"39. A plea of bar to jurisdiction of a civil court must be considered having regard to the contentions raised in the plaint. For the said purpose, averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety. The court may not be justified in determining the question, one way or the other, only having regard to the reliefs claimed dehors the factual averments made in the plaint. The

rules of pleadings postulate that a plaint must contain material facts. When the plaint read as a whole does not disclose material facts giving rise to a cause of action which can be entertained by a civil court, it may be rejected in terms of Order 7 Rule 11 of the Code of Civil Procedure."

11. It will be necessary to refer to the paragraph No.20 of the impugned Judgment. Grounds (d), (e) and (i) in the said paragraph read thus :

(d) The inquiry held by the sub Divisional Officer, B.S.D. under the provisions of section 20(2) of the Maharashtra Land Revenue Code, 1977 was held without giving notice of 10 clear days to the Plaintiff as required under the provisions of the Maharashtra Land Revenue (Inquiry into Trial of land) Rules, 1967. The Plaintiff submits that in view of no proper notice being given to the Plaintiff as per the said Rules, there has been no notice in law to the Plaintiff and the said inquiry has been held without any notice;

(e) The Plaintiff further submits that the said Sub Divisional Officer B.S.D. with ulterior motives at the instigation of third parties did not give adequate time to the Plaintiff to produce sufficient documents to show her title which was asked for by the Plaintiff by her

constituted Attorneys letter dated 25th October 1975 and therefore the said inquiry held by the Sub Divisional Officer, B.S.D. is illegal, improper and invalid and the report made by the said Sub Divisional Officer, B.S.D. based on the alleged inquiry and the order passed by the Additional Collector based on the said report, **are all illegal, invalid and not binding upon the Plaintiff**:

(i) The Plaintiff was not given any opportunity to examine the report of the Defendant and to produce her evidence to show her title to the said plots of land;

12. On the basis of the report made by the Sub Divisional Officer, the Respondent No.1-Additional Collector passed order dated 5th February 1976. The Additional Collector has not given any hearing to the Appellant on the basis of the Report. In the plaint, there are clear assertions that the order is invalid and not binding on the Appellant. The invalidity of the order is specifically set up as a ground of challenge in the suit. Therefore, the bar of section 11 of the said Act of 1876 applied by the Trial Court at the threshold will not be attracted in view of the decision of Full Bench of this Court in case of Abdullamiyan (supra). The Trial Court has observed that bar of section 4 of the said Act of 1876 is also attracted. Apart from the fact that none of the clauses (a) to (k) of section 4 are applicable to

this case, when invalidity or lack of jurisdiction and/or nullity of an order is set up as a ground of attack, jurisdiction of Civil Court under section 9 of the Code of Civil Procedure, 1908 will not be ousted. Whether the Plaintiff succeeds on evidence in establishing that the order is invalid or without jurisdiction is altogether a different aspect.

13. The learned Trial Judge has not at all considered the decision of Full Bench of this Court. The Trial Court

erroneously held that clause (g) of section 4 of the said Act of 1876 will be attracted. Clause (g) deals only with claims regarding boundary dispute or order passed regarding boundary marks. In the present case, there is no claim or order regarding boundary marks. Thus, the order of rejection of the plaint deserves to be set aside. The Appeal must succeed.

14. Hence, I pass the following order :

(i) The impugned order dated 15th April 1985 is quashed and set aside.

(ii) The S.C.Suit No.4597 of 1978 is restored to file.

(iii) The Trial Court will decide the suit on its own

merits expeditiously and preferably before 31st July 2007.

(iv) Writ of this order and Record and Proceedings to be sent back immediately even before decree is drawn.

Judge.